Petition

81-814

Office - Supreme Court, U.S.
FILED
OCT 29 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Respondent

v.

GERALD MILLIS CADY, ARNOLD CLAY MELTON and PHILLIP IRVING GOODMAN, III,
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WARREN BURNETT ASSOCIATED
WARREN BURNETT
307 Loop 338 East
Odessa, Texas 79763

Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED FOR REVIEW

I. WAS THE GOVERNMENT COVERT ENTRY INTO A PRIVATE PLANE TO INSTALL AN ELECTRONIC TRACKING DEVICE OR BEEPER AND THE SUBSEQUENT USE OF THE DEVICE A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT.

II. GIVEN THAT PETITIONERS EITHER HAD THEIR MOVEMENTS TRACKED BY THE BEEPER OR THAT THEY HAD AN INTEREST IN THE PLANE TO WHICH THE BEEPER WAS ATTACHED, WERE PETITIONERS' LEGITIMATE EXPECTATIONS OF PRIVACY SUFFICIENT TO CHALLENGE THE SEARCH IN QUESTION.

III. ASSUMING THAT EITHER THE INSTALLATION OR MONITORING OF THE BEEPER WAS A SEARCH, WAS THE WARRANT IN QUESTION INVALID BECAUSE IT AUTHORIZED A 90-DAY SEARCH.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	4
I. The Court Has Never Ruled On Whether The Fourth Amendment Protects Private Property From Government Covert Entry To Install An Electronic Tracking Device Or Beeper.	4
II. The Court Has Never Ruled, And There Is Confusion Among The Circuits, On Whether The Fourth Amendment Protects Privacy Of Movement.	5
III. Corollary To The Above Two Issues, The Court Should Determine Whether Petitioners' Legitimate Expectations Of Privacy Are Sufficient To Challenge The Government's Covert Entry To Install, And Its Subsequent Use Of, Electronic Tracking Devices.	7
IV. The Decision Below Ignores This Court's Decision In U.S. v. Berger, Conflicts With The Holdings Of A Fellow Circuit, And Trespasses On The Warrant Requirement Of The Fourth Amendment.	9
PRAYER	11
CERTIFICATE OF SERVICE	12
APPENDIX I — Opinion of the United States Court of Appeals for the Fifth Circuit	A-1
APPENDIX II — Unreported Opinion of the Northern District of Texas, San Angelo Division	A-5
APPENDIX III — Ruling of the Court on the Petition for Rehearing	A-10

LIST OF AUTHORITIES

CASES	Page
Berger v. U.S., 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967)	9, 10
Dalia v. U.S., 441 U.S. 238, 247, 99 S.Ct. 1682, 60 L.Ed. 2d 177 (1979)	4
Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)	6, 10, 11
Smith v. Maryland, 442 U.S. 736, 741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)	5
U.S. v. Alderman, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)	8
U.S. v. Bailey, 628 F.2d 938, 945 n.12 (6th Cir. 1980)	9
U.S. v. Bruneau, 594 F.2d 1190, 1194 (8th Cir.), cert. denied 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979)	4, 5
U.S. v. Cofer, 444 F.Supp. 146 (W.D. Tex. 1978)	4, 6, 10
U.S. v. Holmes, 521 F.2d 859, 868, affirmed on the standing issue by a majority on rehearing en banc, 537 F.2d 227 (5th Cir. 1976)	8
U.S. v. Lamonge, 458 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863, 93 S.Ct. 153, 34 L.Ed.2d 110 (1972)	10
U.S. v. Michael, 645 F.2d 252 (5th Cir. 1981), cert. pending	6
U.S. v. Miroyan, 577 F.2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978)	4, 5
U.S. v. Moore, 562 F.2d 106 (1st Cir.), cert. denied, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978)	6
U.S. v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980)	7
U.S. v. Rakas, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)	7
U.S. v. Rawlings, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 2d 633 (1980)	7
U.S. v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980)	7
U.S. v. Shovea, 580 F.2d 1382 (10th Cir.), cert. denied, 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979)	6

UNITED STATES CONSTITUTION	
Fourth Amendment	2, 5, 7, 8, 9, 10

UNITED STATES STATUTES	
28 U.S.C. § 1254(1)	2

UNITED STATES SUPREME COURT RULES	
Rule 17.1	2

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Respondent

v.

GERALD MILLIS CADY, ARNOLD CLAY MELTON and PHILLIP IRVING GOODMAN, III,
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is attached as Appendix I. The ruling of the Court on the Petition for Rehearing is attached as Appendix III. Appendix II contains the unreported opinion of the Northern District of Texas, San Angelo division.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed Petitioners' convictions on July 17, 1981. A timely Petition for Rehearing was denied on September 15, 1981. The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254(1) and Rule 17.1, United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF FACTS

On March 30, 1980, Investigator Robert Nestoroff saw a small private plane, FAA Number N-32RM, parked on the ramp at Ragsdale West Aviation in Austin, Texas. He looked into the plane and saw all the seats in place. On April 2, 1980, Nestoroff saw the plane again, this time at Ragsdale East in Austin, and found the passenger seats gone and the plane muddy with weeds hanging from the landing gear. A U.S. Customs agent also looked into the plane and saw what he believed to be marijuana debris. On this basis and on this same day, April 2, a warrant, authorizing the installation and monitoring of a beeper anytime within a 90-day period, was issued and in the early morning hours of April 3, federal agents broke into the plane and installed the beeper.

At various times after April 3, the beeper was used to track the plane, including flights in California, Arizona, New Mexico, and Texas. On April 19, early morning, N-32RM was tracked by beeper and by visual surveillance (U.S. Customs planes) to San Antonio and then to the border, where beeper contact and visual surveillance was lost. At about 4:00 p.m. that same day beeper contact was made with N-32RM as it crossed the border east of Laredo. Based on the beeper signal, visual contact was made. Four U.S. Customs planes followed N-32RM to a landing strip near Sonora, Texas. N-32RM landed, the Customs planes followed it down, and 870 pounds of marijuana were found in the plane. N-32RM's pilot, Gerald Cady, was arrested. A pickup truck was parked at the strip and its occupants, Arnold Melton and Phillip Goodman, were also arrested.

On July 18, 1980, the District Court of the Northern District of Texas, J. Woodward presiding, heard Petitioner's motion to suppress. In a memorandum opinion dated July 23, 1980, the court denied the motion, holding that Melton and Goodman lacked standing and that, in any case, the search was valid because the police acted within a reasonable time, the 90-day limit in the warrant being "surplusage".

The Fifth Circuit affirmed in a decision dated July 17, 1981. Without ruling on the search or standing issues, the court found that the search took place within a reasonable time and therefore the 90-day time limit in the warrant was not controlling. Petitioner's Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

THE COURT HAS NEVER RULED ON WHETHER THE FOURTH AMENDMENT PROTECTS PRIVATE PROPERTY FROM GOVERNMENT COVERT ENTRY TO INSTALL AN ELECTRONIC TRACKING DEVICE OR BEEPER.

On April 2, 1980, in late evening, federal agents broke into a private plane parked on a rented space at Ragsdale East Aviation, Austin, Texas, and spent the next four hours inside the plane installing an electronic tracking device or beeper. While installing the beeper, federal agents searched the interior of the plane, seized plant debris, and submitted the debris to the Austin Police Department lab for analysis. The installation was done without Petitioner Cady's consent or knowledge.

On whether this was a search requiring a warrant the Fifth Circuit wrote that "this is not certain, but for purposes of argument we shall assume it." Other courts dealing with the installation of beepers by covert entry have indicated by way of dictum or holding that such a trespass is a search within the meaning of the Fourth Amendment. E.g. *U.S. v. Bruneau,* 594 F.2d 1190, 1194 (8th Cir.), *cert. denied* 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979); *U.S. v. Miroyan,* 577 F.2d 489, 492 (9th Cir.), *cert. denied,* 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978); *U.S. v. Cofer,* 444 F.Supp. 146 (W.D. Tex. 1978). Although this Court has never ruled on beepers, in *Dalia v. U.S.,* 441 U.S. 238, 247, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979), the Court expressed the view that covert entries are constitutional only if they

are at least made pursuant to a warrant. Also relevant is *Smith v. Maryland*, 442 U.S. 736, 741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), where the Court, in deciding that pen registers violated no legitimate expectation of privacy, found it significant that the installation of the device involved no invasion of the defendant's property.

Covert entry to install electronic tracking devices, devices which convert private property into surveillance tools of the police, is a Fourth Amendment invasion in its more obvious form. Yet the Fifth Circuit wavers on the issue because of the perceived lack of controlling precedent. Petitioners now ask the Court to establish the rule that covert entry to install electronic tracking devices implicates the Fourth Amendment and requires the authorization of a neutral magistrate in the form of a validly issued search warrant.

II.

THE COURT HAS NEVER RULED, AND THERE IS CONFUSION AMONG THE CIRCUITS, ON WHETHER THE FOURTH AMENDMENT PROTECTS PRIVACY OF MOVEMENT.

The novel question posed by beepers is whether the Fourth Amendment protects privacy of movement. Many courts have faced the issue, few have tackled it. What consensus exists is that there is none: the Eighth and Ninth Circuits recognize no such privacy, *U.S. v. Bruneau*, 594 F.2d 1190 (8th Cir.), *cert. denied*, 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979), *U.S. v. Miroyan*, 577 F.2d 489 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978); the First and Tenth Circuits, a privacy protected by probable cause

but not a warrant, *U.S. v. Shovea*, 580 F.2d 1382 (10th Cir.), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979), *U.S. v. Moore*, 562 F.2d 106 (1st Cir.), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978); the Fifth Circuit, reasonable suspicion when the installation involves the outside of a vehicle, *U.S. v. Michael*, 645 F.2d 252 (5th Cir. 1981), *cert. pending* (beeper attached to bumper of van), and a warrant when the installation requires covert entry, *U.S. v. Cofer*, 444 F.Supp. 146 (W.D Tex. 1978) (beeper installed inside private plane).

The above is understandable confusion, given the intangible nature and worth of personal movement and the absence of controlling precedent. Courts are left on their own, and therefore we have the situation where Constitutional protection for beepered citizens depends on where one lives, and for every court that grapples with the issue, three sidestep it. (Witness the decision below.) Privacy of movement is a Constitutional question of novelty and importance, and its resolution, for good or bad, gives us a glimpse of the future. It is a responsibility few courts seek. Petitioners feel confident in saying that if the matter is to be resolved judicially, it will be done by this Court and no other.

If the Court decides to wrestle the issue it will have but an analytical path to follow. Petitioners have read enough electronic gadget cases to know that it is almost a cliche to say that the starting point is *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The beauty, or horror, of *Katz* is that it dictates no result. *Katz* supplies an analysis, no more. But it is worth noting that what the wiretap is to the ear, the beeper is to the

eye. Both "enhance" surveillance, both take the police where they would ordinarily not be able to go. And where the wiretap destroys privacy of conversation, the beeper destroys privacy of movement.

The question remains, though, whether the Fourth Amendment protects privacy of movement. The metaphysical guide words may be self-worth and Orwellian technology. A little more pragmatically, we are talking about adapting the Constitution to modern technology without sacrifice of Constitutional viability. It is a matter best suited to the prestige and resources of the Court, and Petitioners respectfully ask for a grant of certiorari on the issue.

III.

COROLLARY TO THE ABOVE TWO ISSUES, THE COURT SHOULD DETERMINE WHETHER PETITIONERS' LEGITIMATE EXPECTATIONS OF PRIVACY ARE SUFFICIENT TO CHALLENGE THE GOVERNMENT'S COVERT ENTRY TO INSTALL, AND ITS SUBSEQUENT USE OF, ELECTRONIC TRACKING DEVICES.

In *U.S. v. Rakas,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), and in cases since, *U.S. v. Rawlings,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), *U.S. v. Salvucci,* 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1980), *U.S. v. Payner,* 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the Court has reiterated that Fourth Amendment rights are personal and that the test for standing is whether a citizen's legitimate expectation of privacy has been implicated. The application

here depends on what the Court defines as a reasonable expectation of privacy. If the Court finds that it is reasonable for a citizen to expect that his private property will remain free of covert entry to install electronic tracking devices, it is clear that Petitioner Cady can challenge the search. Cady had possessory control of the plane at the time of installation. He piloted the plane, provided for its maintenance, paid the fuel bills, and put up the money for the rental space upon which the plane rested when the covert entry occurred. On these facts both the trial court and the Fifth Circuit easily found that Petitioner Cady had a legitimate expectation of privacy in the invaded plane.

If the Court finds that the Fourth Amendment protects privacy of movement, then it follows that a citizen's Fourth Amendment rights are implicated if his movements are tracked by the beeper. See *U.S. v. Alderman,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (citizen has standing to challenge wiretap if his conversations are tapped). In this sense all three Petitioners can challenge the use of the beeper: Cady, the pilot, on the basis of being in the plane while it was being monitored by the government, and Melton and Goodman, because their movements became monitored when the beepered plane landed at the airfield where the two men were waiting. See *U.S. v. Holmes,* 521 F.2d 859, 868, affirmed on the standing issue by a majority on rehearing en banc, 537 F.2d 227 (5th Cir. 1976) (held that those present on property where beepered van was tracked to have standing to challenge the installation and use of the beeper on the basis that their movements were monitored when the van entered the property).

IV.

THE DECISION BELOW IGNORES THIS COURT'S DECISION IN U.S. v. BERGER, CONFLICTS WITH THE HOLDINGS OF A FELLOW CIRCUIT, AND TRESPASSES ON THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

The warrant authorized a 90-day search; the search lasted 17 days. The trial court and the Fifth Circuit held that, regardless of what the warrant said, the police acted within a reasonable time and therefore the search was valid. The question before the Court is do we measure reasonableness of time of a search by what the warrant says or by what the police do?

Berger v. U.S., 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), is in point. In *Berger* the Court struck down a New York wiretap statute and warrant which authorized electronic surveillance for two months. First the Court found the 60-day authorization to be unreasonable, noting that the "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." 388 U.S. at 59, 87 S.Ct. at 1883, 18 L.Ed.2d at 1052. Then, even though the wiretap lasted only 13 days, the Court struck down the warrant because it authorized a search for an unreasonable time (60 days). 388 U.S. at 100, 87 S.Ct. at 1904, 18 L.Ed.2d 1076 (Harlan, J., dissenting).

Berger has been followed in the only other Circuit to consider the question. In *U.S. v. Bailey*, 628 F.2d 938, 945 n.12 (6th Cir. 1980), the court found the actual search time (70 days) irrelevant and invalidated a beeper

warrant which contained an unreasonable time limit (indefinite). And in *U.S. v. Lamonge*, 458 F.2d 197 (6th Cir.), *cert denied*, 409 U.S. 863, 93 S.Ct. 153, 34 L.Ed.2d 110 (1972), it was held that two undated wiretap warrants were facially invalid because of the inherent unreasonable time limits even though the actual searches lasted at the most eight days apiece. See also *U.S. v. Cofer*, 444 F.Supp. 146 (W.D. Tex. 1978) (court invalidated a 38-day airplane beeper search because of the lack of time limit in the warrant and held that the reasonable time must be reflected on the face of the warrant).

The trial court and the Fifth Circuit now hold that police conduct is the relevant factor and that it doesn't matter much what the warrant says, short of it being of unlimited duration. The Fifth Circuit speaks not of *Berger* or the Sixth Circuit opinions. The opinion cites no case.

Petitioners wonder if the Fifth Circuit is not leading us to a land unburdened by the warrant requirement of the Fourth Amendment. The Fifth Circuit upheld the search because it said the federal agents acted reasonably. In *Katz* the Court wrote:

> The Government urges that because its agents . . . did no more than they might have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. . . . They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. . . .

> . . . And bypassing a neutral predetermination of the *scope* (original emphasis) of a search leaves individuals secure from the Fourth Amendment violations only in the discretion of the police.

389 U.S. at 356-59, 19 L.Ed.2d at 585-86. Isn't the Circuit here retroactively validating police conduct? Isn't the Circuit inviting police discretion through its hindsight analysis? The Fifth Circuit today asks us to ignore the words of the magistrate and look only to the actions of the police. But what becomes of the warrant requirement in such an analysis, for if it doesn't matter much what a magistrate says, why ask him?

PRAYER

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted in this case.

Respectfully submitted,

WARREN BURNETT ASSOCIATED
307 Loop 338 East
Odessa, Texas 79763

WARREN BURNETT

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari have been forwarded to Mr. James A. Rolfe, United States Attorney, 310 U.S. Courthouse, Ft. Worth, Texas 76102.

Dated this _____ day of October, 1981.

WARREN BURNETT
Attorney for Petitioners

APPENDIX I

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gerald Millis CADY, Arnold Clay Melton and
Phillip Irving Goodman, III,
Defendants-Appellants.

No. 81-1015

Summary Calendar.

UNITED STATES COURT OF APPEALS
Fifth Circuit
Unit A

July 17, 1981.

Defendants were convicted in the United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, of federal drug offenses and they appealed. The Court of Appeals, Gee, Circuit Judge, held that government agents' exercise for 17 days of authority given them by virtue of a warrant authorizing the installation of a beeper on defendants' aircraft did not violate the Fourth Amendment; for purposes of motion to suppress evidence obtained through beeper, warrant was subject to scrutiny not for the period actually authorized for monitoring, but rather for reasonableness of authority actually exercised under warrant.

Affirmed.

* * *

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, RUBIN and RANDALL, Circuit Judges.

GEE, Circuit Judge:

The appellants, pilot and pick-up men in an airborne marijuana smuggling operation, were convicted of and sentenced for federal drug offenses at a bench trial, conducted on stipulated evidence. On this appeal they complain that most of this evidence should have been suppressed on their motion, filed and denied before the stipulation was made. Their points for reversal are founded on circumstances surrounding the installation and monitoring of an electronic beacon, or beeper, on their aircraft. By its use they were located and caught red-handed.

Appellants contend that the installation of the beeper, an act that required physical entry of the aircraft, was an act sufficiently intrusive as to be deemed a search. This is not certain,[1] but for purposes of argument we shall assume it. If so, the search was authorized by a validly issued warrant based, as appellants do not dispute, on probable cause.

The court below found that the two appellant pick-up men, who were merely meeting the aircraft, lacked standing to challenge the beeper installation or monitoring. These appellants attack that finding before us. Since, however, the convicted pilot's standing to make that challenge is not disputed, we need not decide this issue

1. *See United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc) (warrantless entry of vehicle by unlocked door, to view identification number of side panel).

either: his complaint requires discussion of the last point urged for reversal, and our disposition of it decides the appeal.

Appellants' final claim is that the warrant in question is invalid in its entirety as not specifying a reasonable time limit on the monitoring that it authorizes.[2] The overall time specified in the warrant, both for installation of the beeper and for monitoring it after installation, is 90 days, a period that appellants claim is unreasonable. In the actual event, the beeper was installed within hours of the warrant's issuance, and the appellants were caught within 17 days of it. Appellants invite us to focus exclusively on the 90-day authorization period specified in the warrant, ignoring the actual authority exercised under it.[3] The suggestion is an appealing one but, we conclude, too exquisite for a real world of dope smuggling and law enforcement. We think a two-stage approach more realistic and appropriate.

The fourth amendment is our sole guide and concern here. It is too familiar to require citation that resistance to the issuance of general warrants, unrestrained as to

---

2. If, as is suggested by *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc), the mere monitoring of a beeper is not a search at all—a suggestion specifically adopted by the seven specially concurring judges—then this point is meritless. The government does not clearly so contend, however. Nor does the government contend, as well it might have, that the reasonable good faith of these police officers, who obtained a warrant and complied with its terms explicitly, would insulate the evidence in question from suppression. *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc). We therefore determine to decide the case as it is briefed.

3. The argument is trenchantly expressed: "Warrants are the authorizing instruments for searches. They are, in a sense, like statutes, and if the warrant contains a fatal defect, then [any] action taken pursuant to that warrant is also defective."

persons, times, or places, supplied much of the incentive for its adoption. Did we contemplate in this case an authorization, unlimited as to even one of these factors—time—or of such duration as to be unlimited as a practical matter, we might well adopt the suggested analysis and declare any action taken pursuant to it invalid.

We do not, however, and since we do not we scrutinize for reasonableness the authority actually exercised under it, not that which was not.[4] Seventeen days within which to locate a moveable conveyance, to enter it surreptitiously and install a beacon, and to monitor its movements by means of the beacon's transmissions is clearly not an unreasonable time allowance or one within which the probable cause underlying the warrant became stale. This was the authority exercised here. We are not called on to decide, and we do not decide, whether an exercise on the seventieth day, or the ninetieth day, of the authority granted would have been an unreasonable search—if search it be.

AFFIRMED.

---

4. To adopt the rules suggested by appellants would, for example, conduce to such rulings as one invalidating the search of place A, authorized under a warrant that also authorized the search of place B, on a showing that probable cause was lacking to support the authorization to search place B.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CRIMINAL NO. CR-6-80-3

UNITED STATES OF AMERICA

v.

GERALD MILLIS CADY, ARNOLD CLAY MELTON, and PHILLIP IRVING GOODMAN, III

MEMORANDUM OPINION

Pursuant to an application, with accompanying affidavit, by an investigator of the Greater Austin Organized Crime Control Unit, a County Judge of Travis County, Texas on the 2nd day of April, 1980 at 9:10 P.M. issued its order authorizing the installation of an electronic tracking device on a twin-engine Piper Aztec aircraft then located at the Ragsdale Airport near Austin, Texas. The order authorized the installation of the tracking device, including an entry into said aircraft for the purpose of installing same, "as soon as feasible." The order further provided that the authorization was to remain in effect for ninety days.

In accordance with the order the electronic tracking device was installed on the inside of the aircraft in question by law enforcement officers of the United States Government, such installation being made a few hours

after the entry of the order and in the early morning hours of April 3, 1980.

Although the aircraft was not kept under surveillance, and in fact contact with it was lost for several days, by use of the electronic tracking device the aircraft was spotted and tracked to a landing in a remote area in the San Angelo Division of this Court on or about the 19th day of April, 1980. The aircraft was spotted on the ground, agents of the government landed, arrested the pilot, Gerald Millis Cady, and later apprehended Arnold Clay Melton and Phillips Irving Goodman, III, who were not occupants of the aircraft but were apparently standing by on the landing strip to load into their pickup the marijuana which was being transported by the aircraft piloted by Mr. Cady.

The defendants have filed a motion to suppress all of the evidence obtained as a result of the installation of the electronic tracking device, and an evidentiary hearing was held in Lubbock, Texas on the 18th day of July, 1980 with all defendants, their attorneys, and the United States Assistant District Attorney present.

The defendants do not seriously contend that the affidavit submitted to the County Judge in Travis County, Texas failed to show probable cause for the issuance of the Court's order authorizing the installation of the device and this court finds that the affidavit was sufficient in all respects to justify and support the issuance of the court's order in this respect, and that probable cause did exist. The stipulations in evidence presented to the court support this court's finding to that effect.

However, the defendants do attack the validity of the County Court's order of April 2, 1980. Before determin-

ing the validity of such warrant this court must determine whether or not the defendants have standing to challenge the validity of that order.

The pilot, Gerald Millis Cady, clearly has standing. He was pilot of the aircraft and was in possession of the aircraft at the time of his arrest, and his arrest clearly resulted from the information furnished to the arresting officers by the tracking device.

On the other hand, the standing of the other defendants, Arnold Clay Melton and Phillip Irving Goodman, III, has not been established. Neither of these defendants are shown to have been in the aircraft at the time of their arrest nor at any other time and there is no evidence indicating that they had any ownership of the aircraft or any possessory interest therein. The ownership of the landing strip has not been established by the evidence and there is absolutely no evidence to show that these two defendants had any ownership in or possessory right to the landing strip, but insofar as is known to the court and shown by the evidence, these parties could well have been trespassers on this occasion. In any event the motion of Arnold Clay Melton and Phillips Irving Goodman, III, to suppress the evidence in question is denied. The court recognizes the opinion by Judge Simpson in *United States of America v. Holmes,* 521 F.2d 859 (5th Cir. 1975), wherein standing was recognized in three defendants who were present at the time of the search. But these defendants were on property that was shown to be owned by one of the defendants and there is no showing in this . . .

* * *

The problem arises as to limitation that the authorization in the order would exist for a period of ninety days. The defendant contends that this violates not only the ten-day provision of Rule 41, Federal Rules of Criminal Procedure, but that it even exceeds the thirty-day limitation imposed on a wire-tap. 18 U.S.C.A. § 2518(5). As authority, the defendant relies on *The United States of America v. Cofer* in an opinion by Judge Roberts appearing at 444 F.Supp. 146 (Jan. 25, 1978). In that case the warrant authorizing the installation of the beeper device was held to be invalid for three reasons:

1) There was *no* termination date upon which the monitoring of the beeper would cease;

2) The facts contained in the warrant were too stale or too remote in time to justify the issuance of the warrant on August 30, 1977; and

3) The facts contained in the warrant failed to establish probable cause.

In this case the facts were not too stale or remote for the issuance of the order on April 2, 1980 and the facts in the affidavit did establish probable cause. *Cofer* is therefore not authority for a decision in this case as two of the three elements relied on by Judge Roberts are not present here. Further Judge Roberts noted in his opinion that the agents in that particular case probably did not act affirmatively to limit the duration of the possible intrusion into that defendant's privacy by their subsequent and continuous tracking. Here the officers completed their tracking and arrested the defendants within three weeks after the Court's order was issued. Like Judge Roberts, this

court has located no case in which a court has required or even passed on the necessity of prescribing the time-limit in which surveillance by electronic beepers must be undertaken.

Regardless of whether the ninety-day time limit authorization was or was not permissible, the arresting officers executed the warrant within a reasonable time, and this ninety-day provision becomes surplusage. On the other hand it would be unreasonable to expect officers to install a device, not knowing exactly when the aircraft would be used for illicit purposes, and be stymied by lack of an adequate time to determine and investigate the facts of the crime for which probable cause has been established before a magistrate or judge. In this case the agents acted affirmatively to limit the duration of the possible intrusions. There was less than three weeks intervening between the date of the installation of the beeper and the subsequent arrest and search at the airstrip.

Accordingly the motion of all defendants to suppress is denied.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of July, 1980.

/s/ HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 81-1015

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERALD MILLIS CADY, ARNOLD CLAY MELTON and PHILLIP IRVING GOODMAN, III,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(September 15, 1981)

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

Opposition

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-814

In the Supreme Court of the United States

OCTOBER TERM, 1981

GERALD MILLIS CADY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners' Fourth Amendment rights were violated by a warrant-authorized installation and monitoring of a beeper inside an airplane.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Berger v. *New York*, 388 U.S. 41 7

Cardwell v. *Lewis*, 417 U.S. 583 7

Rakas v. *Illinois*, 439 U.S. 128 ..... 4, 5

Rawlings v. *Kentucky*, 448 U.S. 98 ..... 4, 5

United States v. *Bailey*, 628 F. 2d 938 .... 5, 6, 7-8

United States v. *Bruneau*, 594 F. 2d 1190 ..... 5, 7

United States v. *Cofer*, 444 F. Supp. 146 8

United States v. *Holmes*, 521 F. 2d 859, adopted in pertinent part, 537 F. 2d 227 5

United States v. *Hufford*, 539 F. 2d 32, cert. denied, 429 U.S. 1002 ..... 5, 7

United States v. *Knotts*, No. 80-1952 (8th Cir. Oct. 30, 1981) 5-6

United States v. *Lamonge*, 458 F. 2d 197, cert. denied, 409 U.S. 863 7

United States v. *Michael*, 645 F. 2d 252, cert. denied, No. 81-112 (Oct. 19, 1981) ... 5, 7, 8

Page

Cases—(Continued):

United States v. *Miroyan*, 577 F. 2d 489, cert. denied, 439 U.S. 896 5

United States v. *Moore*, 562 F. 2d 106 ..... 5, 6, 7

United States v. *Salvucci*, 448 U.S. 83 5

Constitution and statutes:

United States Constitution, Fourth Amendment 4, 5, 6, 7

21 U.S.C. 846 1

21 U.S.C. 952(a) 2

21 U.S.C. 960 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-814

GERALD MILLIS CADY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4) is reported at 651 F. 2d 290. The opinion of the district court (Pet. App. A-5 to A-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1981. A petition for rehearing was denied on September 15, 1981 (Pet. App. A-10). The petition for a writ of certiorari was filed on October 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of Texas, petitioners were convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Cady was also convicted of importation of

marijuana, in violation of 21 U.S.C. 952(a), 960. Petitioners Goodman and Melton were each sentenced to three years' imprisonment. Petitioner Cady was sentenced to concurrent terms of three years' imprisonment, followed by a two-year special parole term. The court of appeals affirmed (Pet. App. A-1 to A-4).

Prior to trial, petitioners moved to suppress evidence derived from the monitoring of an electronic tracking device, or "beeper," to trace the movements of an airplane that petitioners used to import marijuana from Mexico. The evidence at the suppression hearing showed that on March 30, 1980, Robert Nestoroff, an investigator with the Greater Austin Area Organized Crime Control Unit, observed an aircraft bearing FAA number N-32RM, parked on the ramp at Ragsdale West Aviation in Austin, Texas. As part of his regular inspection duties, Nestoroff looked into the aircraft and observed that all the seats were in place (H. Tr. 13-14).[1]

Three days later, on April 2, 1980, an informant contacted Investigator Nestoroff and described some unusual circumstances involving the N-32RM aircraft. The informant related that at about 5:30 a.m., several men climbed the fence of the airfield (although the gate was open), ran to the aircraft and took off without paying the usual fee (H. Tr. 14-15). Later that day, Nestoroff saw the N-32RM aircraft parked at Ragsdale East Aviation.[2] Nestoroff notified United States Customs officials, and together they inspected the aircraft. The aircraft was muddy, and weeds were hanging from the landing gear. Looking through the window, they observed that the seats had been removed, and Customs pilot Gerald Weatherman pointed out what appeared

---

[1]"H. Tr." refers to the transcript of the suppression hearing.

[2]Both Ragsdale West Aviation and Ragsdale East Aviation are open to the public (H. Tr. 17).

to be marijuana debris on the floor of the aircraft (H. Tr. 16-17). Nestoroff contacted the FAA and discovered that the aircraft had been sold by the recorded owner but that the trade had not been recorded by the purchaser, as required by law (H. Tr. 18-20). Based on this information, on the evening of April 2, 1980, Nestoroff obtained a court order authorizing both the installation of a beeper on the aircraft "as soon as feasible," and monitoring of the beeper for a period not to exceed 90 days (H. Tr. 20-22; Gov't Exh. 1). Following the issuance of the order, Nestoroff immediately notified Customs agents at the airport, who installed the beeper inside the aircraft (H. Tr. 22-23). The installation was completed in the early morning of April 3, 1980.

The stipulated facts (1 R. 116-121)[3] showed that during the next two weeks, aircraft N-32RM was observed in various locations in the southwestern United States and in California. In the early morning of April 19, 1980, a Customs pilot near Roswell, New Mexico, detected the presence of aircraft N-32RM, which appeared to be enroute to south Texas. The N-32RM was followed to San Antonio, where it landed for refueling. The aircraft departed San Antonio and was followed south by a Customs airplane until it crossed the border into Mexico. That afternoon, Customs officials were notified that radar surveillance had detected the suspect aircraft crossing the border near Laredo. Customs authorities followed the suspect aircraft to a dirt airstrip near Sonora, Texas, where the N-32RM landed and was met by a pickup truck. Petitioner Cady, the pilot of the aircraft, and petitioners Goodman and Melton, the occupants of the pickup truck, were arrested. A search of the N-32RM aircraft revealed 870 pounds of marijuana.

---

[3] "R." refers to the record on appeal.

ARGUMENT

Petitioners raise Fourth Amendment claims relating to the installation and monitoring of the beeper on the N-32RM aircraft. None of these claims warrants review.

1. Petitioners first contend (Pet. 4-5) that the Court should grant review to determine whether the entry into the airplane to install the beeper was a search subject to the warrant requirement of the Fourth Amendment. But even if petitioners are correct that a warrant was required to install the beeper, they would not benefit from a holding to that effect because the entry in this case was in fact accomplished pursuant to a valid warrant. Indeed, in addressing this point, the court of appeals assumed that the installation entry was a search, but concluded that "the search was authorized by a validly issued warrant based, as [petitioners] do not dispute, on probable cause" (Pet. App. A-2).[4]

2. Petitioners next contend (Pet. 5-7) that the Court should grant review to determine whether the monitoring of a beeper to follow the movements of an airplane or other conveyance implicates Fourth Amendment protections. Petitioners assert that review is warranted because the lower courts are divided on this issue. But while the courts have taken somewhat different approaches in analyzing this issue, petitioners would have fared no better had their case arisen in any of the other circuits. Thus, this case is not an appropriate one in which to resolve whatever differences may exist among the courts of appeals.

---

[4]Moreover, none of petitioners satisfied "the burden of establishing that his own Fourth Amendment rights were violated by the [installation entry]." *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978). See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980). Petitioners offered no evidence at the suppression hearing to support a legitimate expectation of privacy in the interior of the aircraft on the day of the installation or at any other time.

The courts of appeals have uniformly rejected the argument that beeper surveillance of a motor vehicle or airplane must be conducted pursuant to a warrant. Some courts have held that the use of a beeper to trace the movements of a conveyance does not implicate Fourth Amendment concerns at all, because an individual has no legitimate expectation of privacy in his public travels.[5] See, *e.g.*, *United States* v. *Bruneau*, 594 F. 2d 1190, 1197 (8th Cir. 1979) (airplane); *United States* v. *Miroyan*, 577 F. 2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (airplane); *United States* v. *Hufford*, 539 F. 2d 32, 33-35 (9th Cir.), cert. denied, 429 U.S. 1002 (1976) (automobile). See also *United States* v. *Michael*, 645 F. 2d 252, 259-260 (5th Cir. 1981) (en banc) (C. Clark, J., concurring), cert. denied, No. 81-112 (Oct. 19, 1981) (automobile). Other courts have held that while the Fourth Amendment applies in such situations, the warrantless use of a beeper may be upheld on the basis of either probable cause, see *United States* v. *Moore*, 562 F. 2d 106, 111-113 (1st Cir. 1977) (automobile), or reasonable suspicion. See *United States* v. *Michael*, *supra*, 645 F. 2d at 258 (plurality opinion).[6] The surveillance at

---

[5]Even if the Fourth Amendment applies here, unlike petitioner Cady, who piloted the N-32RM on the day that it was followed to the airstrip near Sonora, Texas, petitioners Goodman and Melton have failed to establish "standing" to raise the monitoring issue. Their reliance (Pet. 8) on the Fifth Circuit's opinion in *United States* v. *Holmes*, 521 F. 2d 859, 868 (1975), adopted in pertinent part, 537 F. 2d 227, 228 n.2 (1976) (en banc), is misplaced because under this Court's Fourth Amendment "standing" decisions subsequent to *Holmes*, petitioners are in no position to challenge the constitutionality of the beeper surveillance. See *United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rawlings* v. *Kentucky*, *supra*; *Rakas* v. *Illinois*, *supra*. Neither petitioner made any showing of a reasonable expectation of privacy in the movements of the airplane, or in their presence on the dirt airstrip; for aught the record shows, they could have been trespassers.

[6]*United States* v. *Knotts*, No. 80-1952 (8th Cir. Oct. 30, 1981), petition for rehearing en banc pending, and *United States* v. *Bailey*, 628 F. 2d 938 (6th Cir. 1980), are not inconsistent with these decisions. In

issue here—which unquestionably was supported by probable cause—would pass muster under any of these approaches.

3. Finally, petitioners contend (Pet. 9-11) that, notwithstanding the fact that the beeper surveillance consumed no more than 17 days, the instant warrant was invalid because it authorized the agents to monitor the beeper's location for a 90-day period. This contention does not warrant review.

As we have pointed out, the courts of appeals have consistently concluded that the Fourth Amendment does not impose any warrant requirement on the use of a beeper to monitor the public movements of a vehicle. Thus, even if the 90-day surveillance authorization in the warrant was unreasonable, any such defect could not serve to invalidate the agents' actions—which petitioners do not challenge as unreasonable—in monitoring the beeper for 17 days.

Knotts, the court suppressed evidence obtained as a result of the warrantless monitoring of a beeper attached to a can of noncontraband chemicals. The court based its decision on the fact that the beeper disclosed the location of the chemicals on private property in a location concealed from public view. The court in *Knotts* did not express any disagreement with those courts that have upheld the warrantless use of a beeper to trace the movements of a vehicle over public roads (see slip op. 4, 6). Similarly, in *Bailey*, the court suppressed evidence seized following the use of a beeper (pursuant to a warrant that the court held was invalid) to locate a drum of chemicals inside a private dwelling. Like the Eighth Circuit in *Knotts*, the Sixth Circuit in *Bailey* distinguished those decisions upholding the warrantless use of a beeper to follow a vehicle. 628 F. 2d at 942. See also *United States* v. *Moore*, *supra*, 562 F. 2d at 111-114 (holding that a warrant is required to monitor the location of a beeper inside a private residence, but that no warrant is required where a beeper is used to follow an automobile). Here, in contrast to *Knotts* and *Bailey*, the beeper merely assisted law enforcement agents in following the flight of an airplane, and did not enable the agents to locate the airplane in a private area shielded from public view.

The cases upon which petitioners rely do not require a different result. In *Berger* v. *New York*, 388 U.S. 41 (1967), this Court struck down a New York wiretap statute that, *inter alia*, authorized interception of telephone conversations for a two-month period on a single showing of probable cause, allowed two-month extensions without a new showing of probable cause, and did not provide for termination of the tap even after the conversation sought had been seized. *Id.* at 59-60. *Berger* is inapposite because the seizure of conversations entails a much greater intrusion into privacy interests than does the use of an electronic tracking device to trace the public travels of an airplane. See *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Thus, while it is unreasonable under the Fourth Amendment to conduct electronic eavesdropping without prior judicial authorization, the warrantless use of a beeper to monitor the public location of an automobile or airplane is not unreasonable and arguably does not even constitute a search or seizure within the meaning of the Fourth Amendment. See, *e.g.*, *United States* v. *Michael*, *supra*; *United States* v. *Bruneau*, *supra*, 594 F. 2d at 1197; *United States* v. *Moore*, *supra*, 562 F. 2d at 112; *United States* v. *Hufford*, *supra*, 539 F. 2d at 34.[7]

United States v. *Bailey*, 628 F. 2d 938 (6th Cir. 1980), is also inapposite for similar reasons. The object of the surveillance in *Bailey* was a drum of noncontraband chemicals that the defendants stored inside a private residence. The decision in *Bailey* turned on the court's conclusion that a warrant was required because the defendants had manifested a legitimate expectation of privacy by placing their

---

[7]Because the beeper surveillance in this case was permissible without a warrant, *United States* v. *Lamonge*, 458 F. 2d 197, 199 (6th Cir.), cert. denied, 409 U.S. 863 (1972), which, like *Berger*, involved a wiretap, is similarly distinguishable.

property in a private location. *Id.* at 943-944. The court specifically distinguished other cases, similar to this one, which had upheld the warrantless use of a beeper to monitor a vehicle's public travels. *Id.* at 942. Thus, regardless of whether *Bailey* was correctly decided, that decision affords petitioners no assistance here.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

DECEMBER 1981

---

[8] *United States* v. *Cofer*, 444 F. Supp. 146, 149-150 (W.D. Tex. 1978), also cited by petitioners (Pet. 10), held that a beeper warrant was invalid because, *inter alia*, it placed no time limit on the use of a beeper to monitor the movements of an airplane. But *Cofer* was effectively overruled by *United States* v. *Michael*, *supra*, which held that beeper surveillance of an automobile may be conducted without a warrant.

DOJ-1981-12